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KROMTECH ALLIANCE CORPORATION

11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON
13

14 RIVER CITY MEDIA, LLC, a
Wyoming limited liability company,
15 MARK FERRIS, an individual,
MATT FERRIS, an individual, and
16 AMBER PAUL, an individual,

17 Plaintiffs,

18 v.

19 KROMTECH ALLIANCE
CORPORATION, a German
20 corporation, CHRIS VICKERY, an
individual, CXO MEDIA, INC., and
21 STEVE RAGAN, an individual, and
DOES 1-50,

22 Defendants.
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Case No. 2:17-cv-00105-SAB

**DEFENDANT KROMTECH ALLIANCE
CORPORATION'S RENEWED MOTION TO
DISMISS PLAINTIFFS' CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

FED. R. CIV. P. 12(B)(2)

Date: September 13, 2018
Time: 2:00 p.m.
Judge: The Hon. Stanley A.
Bastian
Courtroom: 755
Trial Date: July 15, 2019

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NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' CLAIMS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 13, 2018, at 2:00 p.m., or as soon thereafter as this motion may be heard in this Court, located at the Thomas S. Foley United States Courthouse, 920 West Riverside Avenue, Room 755, Spokane, WA 99201, defendant Kromtech Alliance Corporation ("Kromtech") will move to dismiss the First Amended Complaint (ECF No. 110), filed by plaintiffs River City Media, LLC, Mark Ferris, Matt Ferris and Amber Paul ("Plaintiffs"). This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(2) and is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Sergii Sosniak in Support of Defendant Kromtech Alliance Corporation's Motion to Dismiss (ECF No. 42 ("Sosniak Decl.")), all papers on file, and upon such other matters that may be presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

As this Court noted in ruling on Kromtech's first motion to dismiss 10 months ago, Plaintiffs' original Complaint "[did] not allege facts that definitively support a finding of personal jurisdiction over Defendant[] Kromtech" (ECF. No. 60 ("Order") at 12–13.) Plaintiffs subsequently requested and received extensive jurisdictional discovery from Kromtech—and thus had ample opportunity to explore, as the Court put it, "the *possibility* that additional facts can be discovered and alleged that will establish personal jurisdiction over [Kromtech]." (Order at 13 (emphasis added).) Nearly a year later, Plaintiffs' First Amended Complaint ("FAC") confirms that Plaintiffs did not discover and cannot allege any such facts. Indeed, as the Court predicted, "discovery regarding the relationship between Kromtech and Vickery will permit Plaintiffs and the Court to accurately assess whether it has personal jurisdiction over Kromtech." (Order at 10.) And now, even with the benefit of discovery, Plaintiffs have shown they cannot meet their burden to "produce[]"

1 admissible evidence which, if believed, is sufficient to establish the existence of [this
2 Court's] personal jurisdiction" over Kromtech. (Order at 3.)

3 At the outset, Plaintiffs make no effort to establish general jurisdiction. Nor
4 do they plead facts supporting specific jurisdiction—*i.e.*, that Kromtech purposefully
5 directed conduct toward Washington *and* that Plaintiffs' claims arise out of
6 Kromtech's forum-related activities. The FAC offers no facts showing that
7 Kromtech itself engaged in any conduct sufficient to constitute minimum contacts
8 with Washington. Instead, Plaintiffs' jurisdictional theory rests on the unsupported
9 legal conclusion that each Defendant (including Kromtech) acted as every other
10 Defendant's agent. That is no substitute for *facts* showing that Kromtech
11 purposefully directed any relevant conduct at Washington *and* that Plaintiffs' claims
12 arise from such conduct. Plaintiffs' failure to plead such facts requires dismissal.
13 But even if Plaintiffs had met their burden, exercising personal jurisdiction over
14 Kromtech would not comport with fair play and substantial justice.

15 For these reasons, Kromtech respectfully requests that the Court grant this
16 Motion and enter an order dismissing it from this action pursuant to Rule 12(b)(2).

17 **II. FACTUAL BACKGROUND**

18 **A. Defendants Kromtech and Chris Vickery**

19 Kromtech is a British Virgin Islands corporation headquartered in Dubai,
20 United Arab Emirates. (FAC ¶ 24; Decl. of Sergii Sosniak in Supp. of Kromtech
21 Alliance Corp.'s Mot. to Dismiss ¶ 2.) Kromtech develops security, maintenance,
22 and optimization software applications for Mac computers, including the MacKeeper
23 product, and sells those applications over the Internet. (FAC ¶ 24; Sosniak Decl. ¶
24 3.)

25 Kromtech does not have any offices in Washington, does not own or rent any
26 property in Washington, and has no assets in Washington. (Sosniak Decl. ¶ 4.) None
27 of Kromtech's directors, officers, or employees reside or work in Washington, and
28 Kromtech has no agent for service of process here. (*Id.*)

1 No business or corporate relationship is alleged, and none existed, between
 2 Kromtech and Defendants Steve Ragan or CXO Media, Inc. (*Id.* ¶ 6.) As to
 3 Defendant Vickery, he is not and has never been an employee of Kromtech. (*Id.*) In
 4 January 2016, Kromtech retained Vickery as an independent contractor to provide
 5 two services: (1) advise Kromtech on network security, and (2) publish two articles
 6 each month; one article about a data breach, the other regarding a general security
 7 topic. (*Id.* & Ex. A.) Vickery published his articles on the “Security Watch with
 8 Chris Vickery” blog, which was hosted on Kromtech’s MacKeeper.com website. (*Id.*
 9 ¶ 6.)

10 Vickery had full autonomy over how he conducted his research and exclusive
 11 creative control over the content of his blog posts. (*Id.* ¶ 7.) Kromtech exercised no
 12 control over Vickery’s research or the content of his articles—including the article
 13 that Plaintiffs allege contains defamatory statements: “Spammergate: The Fall of an
 14 Empire” (the “Vickery Article”). (*Id.* & Ex. B.) Vickery ended his contract with
 15 Kromtech in April 2017. (*Id.* ¶ 7.)

16 **B. The Court’s Prior Order Permitting Jurisdictional Discovery**

17 In its August 28, 2017, Order on Kromtech’s motions to dismiss, the Court
 18 observed that “the Complaint does not allege facts that definitively support a finding
 19 of personal jurisdiction over Defendant[] Kromtech” (Order at 12–13.)
 20 Specifically, the Court found it could not determine whether it has personal
 21 jurisdiction over Kromtech on the basis of Kromtech’s relationship with Vickery
 22 because “Plaintiff was not able to allege any facts surrounding the [Vickery]
 23 Agreement . . . at the time the Complaint was written.” (*Id.* at 10.) Further noting
 24 that “Plaintiffs alleged facts regarding Vickery’s illegal access of Kromtech’s data
 25 systems,” the Court ruled that “discovery regarding the relationship between
 26 Kromtech and Vickery will permit Plaintiffs and the Court to accurately assess
 27 whether it has personal jurisdiction over Kromtech.” (*Id.*)
 28

1 Plaintiffs subsequently propounded an extensive set of jurisdictional discovery
 2 requests on Kromtech concerning, as the Court suggested, “the relationship between
 3 Kromtech and Vickery” to “permit Plaintiffs and the Court to accurately assess
 4 whether it has personal jurisdiction over Kromtech.” (*Id.* at 10.) Kromtech produced
 5 documents and written discovery in response to Plaintiffs’ discovery requests (*see*
 6 ECF Nos. 88–89), after which Plaintiffs filed their First Amended Complaint on May
 7 31, 2018.

8 **C. Plaintiffs’ Allegations Following Jurisdictional Discovery**

9 The FAC adds just three paragraphs not found in the initial complaint (*see* FAC
 10 ¶¶ 15–17), only one of which relates to Kromtech (*see id.* ¶ 17). Plaintiffs’
 11 substantive averments are unchanged, including the allegations that Vickery accessed
 12 River City Media’s computer network without authorization, collected confidential,
 13 proprietary, and sensitive data, intentionally used that data to make unauthorized
 14 purchases, and published defamatory statements about Plaintiffs in the Vickery
 15 Article. (FAC ¶¶ 40–78.)

16 As before, the FAC does not allege that Kromtech itself accessed River City
 17 Media’s systems, obtained any of its data, made any unauthorized purchases, or
 18 authored any defamatory statements. Instead, Plaintiffs still allege in conclusory
 19 terms that Vickery was “an agent of Kromtech” and “[a]cting on behalf of Kromtech”
 20 when he allegedly stole River City’s data and published defamatory statements. (*See*
 21 *id.* ¶ 17.) Plaintiffs further allege, falsely, that Kromtech “employ[ed] Vickery,” all
 22 in support of an alleged *legal* conclusion that “Kromtech is directly responsible for
 23 Plaintiffs’ damages.” (*See id.*) The only new jurisdictional allegation is that
 24 Kromtech “circulated Vickery’s and other articles within the state of Washington,
 25 where Kromtech marketed and sold a significant number of units of products and
 26 services.” (*Id.*)

1 III. LEGAL STANDARDS

2 A federal court may exercise personal jurisdiction only over a defendant “who
3 is subject to the jurisdiction of a court of general jurisdiction in the state where the
4 district court is located” FED. R. CIV. P. 4(k)(1)(A); (*see generally* Order at 2–
5 6). Where, as here, no federal statute governs personal jurisdiction, courts apply the
6 law of the state in which the district court sits. FED. R. CIV. P. 4(k)(1);
7 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).
8 Washington’s long-arm statute is coextensive with federal due process requirements.
9 *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 771 (1989); *Chan v. Soc.*
10 *Expeditions Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994).

11 “The Due Process Clause protects a defendant’s liberty interest in not being
12 subject to the binding judgments of a forum with which it has established no
13 meaningful contacts, ties, or relations.” (Order at 3–4, citing *Burger King Corp. v.*
14 *Rudzewicz*, 471 U.S. 462, 471–72 (1985).) The exercise of personal jurisdiction over
15 a nonresident defendant comports with due process only when the defendant has
16 “minimum contacts” with the forum state, such that the exercise of jurisdiction does
17 not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v.*
18 *Wash.*, 326 U.S. 310, 316 (1945) (internal quotation and citations omitted).

19 A court may assert either general or specific jurisdiction over a foreign
20 corporation defendant, depending on the nature and extent of the defendant’s contacts
21 with the forum State. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S.
22 915, 918–19 (2011). Each defendant’s contacts with the forum state “must be
23 assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984) (citation omitted).

24 Plaintiffs bear the burden of proving that this Court has personal jurisdiction
25 over Kromtech. *Fed. Deposit Ins. Corp. v. British-Am. Ins. Co., Ltd.*, 828 F.2d 1439,
26 1441 (9th Cir. 1987). To meet that burden, Plaintiffs “cannot simply rest on the bare
27 allegations of its complaint.” (Order at 3 (internal quotation and citation omitted).)
28 And because Kromtech presents facts contesting personal jurisdiction, supported by

1 a declaration, the Court may “not assume the truth of [the] allegations in [the FAC]
 2 that are contradicted” by the declaration. (*See id.*); *Data Disc, Inc. v. Sys. Tech.*
 3 *Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977) (citation omitted).

4 **IV. PLAINTIFFS DO NOT EVEN TRY TO ESTABLISH GENERAL PERSONAL**
 5 **JURISDICTION OVER KROMTECH.**

6 Plaintiffs did not even attempt to argue general jurisdiction in defending the
 7 initial complaint (*see* Order at 4), and fail to establish general jurisdiction in the FAC.
 8 A court may assert general jurisdiction over foreign corporations only “when their
 9 affiliations with the State are so continuous and systematic as to render them
 10 essentially at home in the forum State.” *Daimler AG v. Bauman*, 571 U.S. 117, 127
 11 (2014) (internal quotation and citations omitted). A foreign corporation is “at home”
 12 in its place of incorporation and its principal place of business. *Id.* at 134–36. Only
 13 in an “exceptional” case will general jurisdiction lie in a forum other than a
 14 corporation’s place of incorporation or principal place of business. *Id.* at 139 n.19.
 15 For general jurisdiction to exist, the defendant’s contacts with the forum must rise to
 16 a level that “approximate[s] physical presence” there. *Schwarzenegger*, 374 F.3d at
 17 801 (internal quotation and citation omitted).

18 Plaintiffs allege that Kromtech is a German company, headquartered in Dubai,
 19 that maintains offices in New Orleans, Louisiana. (FAC ¶ 24.) Plaintiffs do not
 20 allege that Kromtech has any business operations, offices, or employees in
 21 Washington. Nor do Plaintiffs allege that Kromtech conducts business in
 22 Washington to the extent that its contacts with Washington “approximate physical
 23 presence.” *Schwarzenegger*, 374 F.3d at 801 (internal quotation and citation
 24 omitted). Because Plaintiffs fail to allege that Kromtech is essentially “at home” in
 25 Washington, they cannot meet their burden of establishing general jurisdiction.

V. THE FAC DOES NOT PLEAD FACTS THAT ESTABLISH SPECIFIC PERSONAL JURISDICTION OVER KROMTECH.

Plaintiffs also cannot establish specific jurisdiction over Kromtech. “The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant ‘focuses on the relationship among the defendant, the forum, and the litigation.’” *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal quotation and citations omitted). As a result, the “defendant’s suit-related conduct must create a substantial connection with the forum State,” and the “relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State.” *Id.* at 1121–22 (internal quotation and citation omitted) (emphasis in original). The court “looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.” *Id.* at 1122; (*see also* Order at 4).

Specific jurisdiction may be exercised only when (1) the nonresident defendant purposefully directed his conduct toward the forum state; (2) the claim “arises out of or relates to the defendant’s forum-related activities”; and (3) the exercise of jurisdiction comports with “fair play and substantial justice, *i.e.*, it must be reasonable.” *Schwarzenegger*, 374 F.3d at 802; (*see also* Order at 4). The third element is only evaluated if Plaintiffs satisfy the first two elements. *Id.* None of these requirements is satisfied here.

A. The FAC Fails to Allege that Kromtech Purposefully Directed Any Conduct Toward Washington.

To start, Plaintiffs fail to show that Kromtech “purposefully direct[ed]” any of the conduct alleged in the FAC toward this forum. “Purposeful direction” requires that the nonresident defendant committed an *intentional act* that was *expressly aimed* at the forum state, causing harm that the defendant *knew* was likely to be suffered *in the forum state*. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citation omitted). The FAC fails to allege facts sufficient to meet Plaintiffs’ burden on each of these three elements.

1 **1. Kromtech did not carry out any jurisdictionally relevant**
 2 **intentional act.**

3 Plaintiffs do not allege that *Kromtech itself* accessed River City’s systems,
 4 obtained any data, or made any unauthorized purchases. The *only* relevant activity
 5 Kromtech is alleged to have undertaken itself is hosting the allegedly defamatory
 6 Vickery Article on the MacKeeper.com website. (See FAC ¶ 72.) But Plaintiffs
 7 concede that *Vickery* is the author of those statements—not Kromtech or any of its
 8 employees. (See *id.* ¶ 67(a).) Kromtech’s MacKeeper.com website hosts a variety
 9 of pages about its products, in addition to the Security Research Center blog. (*Id.* ¶¶
 10 31, 33.) And Vickery’s blog postings were published in a section of the website
 11 specifically entitled, “Security Watch with Chris Vickery”—a clear indication of his
 12 creative and editorial control over that content. (See Sosniak Decl. Ex. B.)

13 **2. Other Defendants’ alleged intentional acts cannot be imputed**
 14 **to Kromtech.**

15 Because Plaintiffs cannot show any jurisdictionally relevant intentional act by
 16 Kromtech, they attempt an end run by imputing other Defendants’ alleged actions to
 17 Kromtech. The FAC’s conclusory allegation that all Defendants acted as each other’s
 18 agents (FAC ¶ 27) falls well short of establishing an agency relationship between
 19 Kromtech and Vickery, Ragan, or CXO Media.¹ None of those Defendants’ alleged
 20 acts can be imputed to Kromtech to show purposeful direction.

21 Following the Supreme Court’s *Daimler* opinion, the Ninth Circuit has
 22 questioned whether an agency theory can establish specific jurisdiction. See *Williams*

23 _____
 24 ¹ Courts routinely reject boilerplate agency allegations like Plaintiffs’ claim that
 25 “[e]ach of the defendants was the agent of each of the other defendants” (FAC ¶ 27).
 26 See *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1115 (9th Cir. 2016); *Castaneda*
 27 *v. Saxon Mortg. Servs., Inc.*, No. 09-cv-1124, 2010 WL 726903, at *6 (E.D. Cal. Feb.
 28 26, 2010).

1 *v. Yamaha Motor Co., Ltd.*, 851 F.3d 1015, 1023–24 (9th Cir. 2017) (“[T]he *Daimler*
 2 Court’s criticism of the [then existing Ninth Circuit agency] standard found fault with
 3 the standard’s own internal logic, and therefore applies with equal force regardless
 4 of whether the standard is used to establish general or specific jurisdiction.”). This
 5 Court too should reject Plaintiffs’ attempt to establish specific jurisdiction via a
 6 tenuous (at best) agency theory.

7 But even if the Court were to entertain an agency theory, Plaintiffs fail to show
 8 the requisite agent-principal relationship—which must exist before an agent’s
 9 contacts may be attributed to the principal for the purposes of establishing specific
 10 jurisdiction. *Id.* To do so, Plaintiffs must allege that “both the principal and the agent
 11 have manifested an assent that the principal has a right to control the agent.” *United*
 12 *Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep’t*, 911 F. Supp.
 13 2d 1118, 1135 (E.D. Wash. 2012) (citation omitted). As explained below, Plaintiffs
 14 cannot make that showing here.

15 “A critical factor” in determining whether an agency relationship exists is the
 16 “degree of control exercised by the principal over the agent.” *Figi Graphics, Inc. v.*
 17 *Dollar Gen. Corp.*, 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998). If the principal has
 18 no control over the day-to-day operations, and has only the right to dictate the end
 19 result, then an independent contractor relationship exists. *Id.* For example, in *Figi*
 20 *Graphics*, the court declined to exercise jurisdiction over the defendant retail store
 21 where the complaint failed to allege specific facts demonstrating that the defendant
 22 had the right to control the day-to-day activities of its importer, the purported agent.
 23 *Id.* at 1266–67. The defendant did not control how or where the importer found its
 24 products, and therefore did not have the “requisite degree of control” over the
 25 importer to establish an agency relationship. *Id.*; *see also Mohamed*, 836 F.3d at
 26 1115 (upholding dismissal where complaint failed to include specific allegations that
 27 Uber controlled individual defendant’s activities).

1 Similarly here, Plaintiffs allege no facts establishing an agency relationship
 2 between Kromtech and any other defendant. Kromtech has no connection to Ragan
 3 or CXO Media, and the FAC fails to plead that Kromtech had the right to control—
 4 or exercised any control—over Vickery’s day-to-day operations. *Cf. Williams*, 851
 5 F.3d at 1023–25, 1025 n.5 (rejecting “conclusory” allegations that defendants were
 6 agents or employees of each other where plaintiff did not provide any factual
 7 assertions regarding degree of control exercised). Plaintiffs offer nothing more than
 8 a bare allegation that Vickery “works as a ‘security researcher’ for MacKeeper.com,
 9 which is owned and operated by Defendant Kromtech.” (*See* FAC ¶ 23.) That is not
 10 nearly enough to establish an agency relationship between Kromtech and Vickery.
 11 Indeed, the mere existence of a relationship in which one person provides services to
 12 another does not satisfy the definition of agency. RESTATEMENT (THIRD) OF AGENCY
 13 § 1.01 cmt. c (2006).

14 Moreover, the Vickery Agreement itself evidences that Kromtech had no right
 15 to control Vickery’s actions. (Sosniak Decl. ¶ 7; *Id.* Ex. A.) Vickery was retained
 16 only to advise Kromtech about network security and to post two articles each month
 17 in his blog, “Security Watch with Chris Vickery.” (*Id.* Ex. A.) Kromtech had no
 18 editorial control over the content of Vickery’s articles. (*Id.*; *see also id.* ¶ 7.) Indeed,
 19 the Agreement does not require that Vickery provide draft articles to Kromtech for
 20 its review, nor does it set out any process by which Kromtech could opine on, much
 21 less dictate, the contents of Vickery’s articles. (*Id.* Ex. A.) Rather, the Vickery
 22 Agreement is entirely silent as to the methods Vickery should use to investigate data
 23 breaches or other security issues. (*Id.*) It does not require, direct, or encourage
 24 Vickery to engage in any form of security investigation—much less the “hacking
 25 campaign” Plaintiffs allege that Defendants carried out. (*Id.*; FAC ¶¶ 17, 78.) To the
 26 contrary, the Vickery Agreement documents Kromtech’s *lack* of control over
 27
 28

1 Vickery's actions. This alone precludes the existence of an agency relationship
2 between Kromtech and Vickery.²

3 **3. Kromtech did not expressly aim any activity at Washington**
4 **or know the alleged harm would likely be felt there.**

5 Plaintiffs also fail to allege that Kromtech's operation of the MacKeeper.com
6 website was expressly aimed at Washington or caused harm that Kromtech knew was
7 likely to be suffered in Washington. This too precludes a finding of purposeful
8 direction.

9 To make the requisite showing in an intentional-tort case, a plaintiff must
10 establish that the nonresident defendant committed an intentional act that was
11 *expressly aimed at the forum state*, and caused harm that the defendant *knew* was
12 likely to be suffered *in the forum state*. *Calder*, 465 U.S. at 789; *see also Lange v.*
13 *Thompson*, No. 08-cv-0271, 2008 WL 3200249, at *3 (W.D. Wash. Aug. 6, 2008)
14 ("When applying *Calder* to the internet context, specific jurisdiction may be based
15 only on the out-of-state defendant's internet activity *expressly aimed or directed to*
16 *the forum state*.") (citations omitted) (emphasis added).

17 Plaintiffs simply have not shown that Kromtech expressly aimed the allegedly
18 defamatory Vickery Article at Washington. The Ninth Circuit has long held that

19 _____
20 ² Plaintiffs' aiding-and-abetting theory fails for the same reasons, as it rests on the
21 same untenable agency theory. (*See* FAC ¶ 27 ("Each of the defendants was the agent
22 of each of the other defendants, and in doing the things hereinafter alleged, was acting
23 within the course and scope of such agency").) Moreover, Plaintiffs' conclusory
24 allegations regarding Kromtech's supposed knowledge of other Defendants' "illegal"
25 activities do not suffice, and the FAC does not assert that Kromtech assisted (let alone
26 "*substantially* assisted") in the alleged primary violations. *See In re Consol.*
27 *Meridian Funds*, 485 B.R. 604, 616 (W.D. Wash. 2013) (reciting elements of aiding
28 and abetting).

1 “something more than mere foreseeability [that harm will result in the forum]” is
2 required “in order to justify the assertion of personal jurisdiction.” *Schwarzenegger*,
3 374 F.3d at 805; *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418–20 (9th Cir.
4 1997) (in cases asserting Internet-based claims, express aiming requires “something
5 more” than making website available to users in forum state).

6 Thus, even if a defendant *knows* a plaintiff resides in the forum state where
7 allegedly defamatory statements are accessible on the Internet, that is not enough to
8 establish “express aiming” at the forum. *Lange*, 2008 WL 3200249, at *3 (defendant
9 did not “expressly aim” allegedly defamatory comments at Washington even though
10 he knew plaintiff resided there when comments were published); *see also Xcentric*
11 *Ventures, LLC v. Bird*, 683 F. Supp. 2d 1068, 1073 (D. Ariz. 2010) (no “express
12 aiming” where there was no connection between allegedly defamatory article and
13 Arizona other than that article was about plaintiff, who defendant knew resided in
14 Arizona); *McGibney v. Retzlaff*, No. 14-cv-1059, 2015 WL 3807671, at *4 (N.D. Cal.
15 June 18, 2015) (recognizing “the plainly obvious proposition that merely posting on
16 the Internet negative comments about the plaintiff and knowing the plaintiff is in the
17 forum state are insufficient to create minimum contacts”) (internal quotation and
18 citation omitted).

19 On this point, the case of *Young v. New Haven Advocate* is particularly
20 instructive. 315 F.3d 256 (4th Cir. 2002). In *Young*, the plaintiff warden of a Virginia
21 prison alleged that two Connecticut newspapers defamed him in Internet articles
22 about his prison and his allegedly racist views. *Id.* at 259, 263. The plaintiff argued
23 that jurisdiction over the Connecticut-based defendants was proper in Virginia
24 because they knew plaintiff was a Virginia resident, they intentionally defamed him
25 in articles posted on their websites which were accessible in Virginia, and the primary
26 effects of the defamatory statements on the plaintiff’s reputation were felt in Virginia.
27 *Id.* at 261–62. Reversing the district court, the Fourth Circuit held that the non-
28 resident defendants were *not* subject to jurisdiction in Virginia because the

1 newspapers had not “manifest[ed] an intent to target and focus on Virginia readers.”
 2 *Id.* at 263. As a result, the newspapers “could not have ‘reasonably anticipate[d]
 3 being haled into court [in Virginia] to answer for the truth of the statements made in
 4 their article[s].’” *Id.* at 263–64 (quoting *Calder*, 465 U.S. at 790) (other citations
 5 omitted).

6 The FAC is similarly devoid of allegations that Kromtech expressly targeted
 7 the Vickery Article at Washington readers through the online publication of the
 8 Vickery Article. Plaintiffs do not allege that Kromtech made any attempt to direct
 9 the Vickery Article at Washington residents or solicit readers for the Vickery Article
 10 from Washington IP addresses. The FAC’s vague allegation that Kromtech
 11 “circulated Vickery’s and other articles within the state of Washington” is wholly
 12 unsupported and insufficient. (FAC ¶ 17.) Plaintiffs do not allege how Kromtech
 13 allegedly “circulated” the Vickery article “within the state of Washington,” precisely
 14 because no such “circulation” occurred. (*Id.*) The best Plaintiffs can do is allege is
 15 that the Vickery Article was published on the Internet, where it was available
 16 globally. That does not suffice to establish express aiming. *See Lange*, 2008 WL
 17 3200249, at *3.

18 Because Kromtech did not “expressly aim” or “direct” any conduct toward
 19 Washington, it could not have “reasonably anticipate[d] being haled into court” in
 20 Washington to answer for the truth of statements made in the Vickery article. *See*
 21 *Young*, 315 F.3d at 264 (internal quotation and citation omitted).

22 **B. Plaintiffs’ Claims Do Not Arise out of Kromtech’s Alleged Forum-**
 23 **Related Activities.**

24 Plaintiffs’ failure to allege facts supporting a finding of purposeful direction
 25 (as explained above) is sufficient by itself to grant Kromtech’s motion. Even so,
 26 Plaintiffs also fail to allege that their claims arise out of Kromtech’s alleged contacts
 27 with the forum. This constitutes an independent basis to dismiss Plaintiffs’ claims
 28 for lack of personal jurisdiction. *See Walden*, 134 S. Ct. at 1122.

1 The Supreme Court has made clear that “mere injury to a forum resident is not
 2 a sufficient connection to the forum.” *Id.* at 1124–25; (*see also* Order at 5
 3 (““Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant
 4 only insofar as it shows that the defendant has formed a contact with the forum
 5 State.”)) (quoting *Walden*, 134 S. Ct. at 1125)). More specifically, a defendant’s
 6 publication of an alleged defamatory article on a website accessible in the forum
 7 where plaintiff suffered reputational injury is not enough to establish specific
 8 jurisdiction; a plaintiff must also show that the defendant’s contacts with the forum
 9 gave rise to plaintiff’s claim. *Callaway Golf Corp. v. Royal Canadian Golf Ass’n*,
 10 125 F. Supp. 2d 1194, 1198 (C.D. Cal. 2000). In *Callaway*, the defendant sold
 11 products through an interactive website accessible to California residents, and
 12 plaintiff brought a defamation claim arising out of an allegedly defamatory press
 13 release on defendant’s website. *Id.* The court granted defendant’s motion to dismiss
 14 because any commercial contacts the defendant had with California had no
 15 relationship to plaintiff’s claim. *Id.* at 1204. As a result, it could not be said that
 16 “but-for” defendant’s commercial activity on its website, plaintiff would not have
 17 suffered the alleged defamation. *Id.*; *see Dymatize Enters. Inc. v. Reflex Nutrition*
 18 *Ltd.*, No. 07-cv-0907, 2008 WL 161021, at *7 n.38 (N.D. Tex. Jan. 17, 2008)
 19 (declining to exercise specific jurisdiction over United Kingdom-based defendants
 20 based on sales of their products to forum state; defamation claim regarding Internet-
 21 based statement did not arise out of those sales).

22 As in *Callaway*, Kromtech’s alleged marketing and sales of products and
 23 services to customers in Washington has no relationship to Plaintiffs’ claims. (FAC
 24 ¶ 17.) Plaintiffs do not allege that “but for” any marketing or sale of Kromtech’s
 25 products or services, Plaintiffs would not have suffered the alleged defamation.³ The
 26 _____

27 ³ Even if Plaintiffs’ claims did arise from the sale of Kromtech products to
 28 Washington (which they do not), “the existence of an interactive website which may

1 FAC’s vague and conclusory allegation that Kromtech allegedly “marketed and sold
2 a significant number of units of products and services” in Washington is inapposite.
3 (*Id.*) This is not a product-liability action where the plaintiffs’ claims and injury arise
4 from the sales of the defendants’ products.

5 Nor does Kromtech’s ownership of the MacKeeper.com website establish that
6 Kromtech exercised any degree of control over any of the other Defendants—much
7 less the specific defamatory aspects of the articles from which Plaintiffs’ claims arise.
8 *See* Section V(A)(2), *supra*; *see also Payne v. Office of the Comm’r of Baseball*, No.
9 15-cv-3229, 2016 WL 1394369, at *6 (N.D. Cal. Apr. 8, 2016) (“arising out of”
10 element not satisfied where plaintiffs did not allege that defendants exerted control
11 over specific acts that gave rise to plaintiffs’ claims).

12 In sum, Plaintiffs have not shown that Kromtech’s forum-related conduct was
13 a but-for cause of their alleged injuries. Plaintiffs’ failure to do so requires dismissal.

14 **C. Exercising Jurisdiction Over Kromtech Would Be Unreasonable.**

15 Plaintiffs’ failure to plead the “purposeful direction” and “arising out of”
16 elements, as explained above, should end the jurisdictional analysis. *See*
17 *Schwarzenegger*, 374 F.3d at 802 (defendant must show unreasonableness *only* if
18 plaintiff succeeds in satisfying first two requirements). But even if Plaintiffs had
19 done so, the exercise of jurisdiction over Kromtech in Washington would not
20 “comport with fair play and substantial justice.” (*See* Order at 5–6.)

21 There is no dispute that Kromtech is a foreign corporation with no offices,
22 employees, property, or other business presence in Washington. Accordingly, it
23 would be exceptionally burdensome for Kromtech to defend this action here.
24 (Sosniak Decl. ¶ 4.) This alone should carry “significant weight” in assessing
25 _____
26 be accessed by Washington residents does not satisfy specific jurisdiction.” *High*
27 *Maint. Bitch, LLC v. Uptown Dog Club, Inc.*, No. 07-cv-0888Z, 2007 WL 3046265,
28 at *3 (W.D. Wash. Oct. 17, 2007) (collecting cases).

1 whether Kromtech should suffer the “unique burden” of being forced to defend this
 2 action in a foreign court. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d
 3 848, 851 (9th Cir. 1993) (“The *unique burdens* placed upon one who must defend
 4 oneself in a foreign legal system should have *significant weight* in assessing the
 5 reasonableness of stretching the long arm of personal jurisdiction over national
 6 borders.”) (internal quotation and citation omitted) (emphasis added).

7 In contrast, any concerns about Plaintiffs’ ability to seek redress for Internet-
 8 based defamation in a forum other than their own “are mitigated [] by the relative
 9 ease of modern air travel.” *Xcentric Ventures*, 683 F. Supp. 2d at 1075 n.2.
 10 “Requiring plaintiffs to bear the burden of traveling is consistent with requiring
 11 plaintiffs to bear the burden of proof at trial, and with the goal served by personal
 12 jurisdiction rules of preventing defendants from being unreasonably haled into a
 13 distant, and potentially biased, forum.” *Id.*

14 Further, as the Court previously noted, “[t]he likelihood that personal
 15 jurisdiction can be constitutionally exercised is directly proportionate to the nature
 16 and quality of commercial activity that an entity conducts over the Internet.” (Order
 17 at 6 (quoting *Cybersell*, 130 F.3d at 419; other internal quotation and citation
 18 omitted).) Courts are cognizant, however, that “[t]he exercise of personal jurisdiction
 19 over nonresidents merely because they allegedly posted defamatory statements on
 20 the internet about a known forum resident could have dramatic consequences for
 21 internet-based communication.” *Xcentric Ventures*, 683 F. Supp. 2d at 1075 n.2.
 22 Specifically, “[t]he ability to hale an internet user into a distant forum based on an
 23 allegation of intentional defamation could be used to chill free speech.” *Id.*

24 Finally, while the burden on Kromtech is great, Washington has little interest
 25 in this dispute. *See id.* It is true that a state “generally has a “manifest interest” in
 26 providing *its residents* with a convenient forum for redressing injuries inflicted by
 27 out-of-state actors.” (Order at 6 (quoting *Burger King*, 471 U.S. at 473; emphasis
 28 added).) Here, however, the individual Plaintiffs are residents of Idaho (FAC ¶¶ 20–

22), and River City Media is a *Wyoming* limited liability company that is not even registered to do business in Washington (FAC ¶ 19; Sosniak Decl. ¶ 5). Plaintiffs plead no Washington state-law causes of action, and Plaintiffs' federal causes of action do not implicate any Washington state interests. (*See* FAC ¶¶ 91–160.)

On balance, the due-process analysis shows that the burdens on Kromtech of litigating in this distant forum are not outweighed by any potential burdens on Plaintiffs or Washington's (non-existent) interest in this dispute. Because requiring Kromtech to defend against Plaintiffs' claims in Washington would not be reasonable, the Court should dismiss Kromtech from this action.

VI. CONCLUSION

For the reasons set forth above, Kromtech respectfully requests that the Court grant this Motion and dismiss Plaintiffs' claims against Kromtech for lack of personal jurisdiction.

Dated: June 15, 2018

Respectfully submitted,

/s/ Christopher B. Durbin

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DECLARATION OF SERVICE

I hereby certify that on June 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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8 I declare under penalty of perjury under the laws of the State of Washington
9 that the foregoing is true and correct to the best of my belief.

10 Signed and dated this 15th day of June, 2018, in Seattle, Washington.

11
12
13 /s/ Christopher B. Durbin
14 Christopher B. Durbin (WSBA No. 41159)